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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. .....

DONALD KINNEY and MARGARET KINNEY,
Petitioners,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ARTHUR W. TEAGUE, MANUEL MENDOZA, GERALD W. STRICKLAND, THOMAS A. SIMONS, IV, CLEMENT VAUGHAN and EDWARD B. RUST,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can this 42 U.S.C. §§ 1983, 1985, and 1986 action be personally selected by the U. S. District Judge and dismissed without a hearing of any kind, oral or written, and without any notice and without even a Motion being filed by the opposing party?

2. Are there violations of due process within the appellate Procedures in the 10th Circuit Court of Appeals so numerous and egregious as to have nullified Petitioners' Right to Appeal?

3. Is the Opinion because it has labeled Petitioners' 42 U.S.C. § 1983 and 1985 Complaint as "patently frivolous" and "obviously not curable" an unconstitutional obscuring of Petitioners' case?

4. Is *Dennis v. Sparks* 449 U. S. 24, 66 Fed 2d 185, 101 S. Ct. 183 rejected by the Opinion? Is the Opinion an illegal extension of judicial immunity?

5. Does "Not for Routine Publication" mean the Opinion is not to be a "precedent" and therefore a discrimination against the Petitioners?

6. Is there a denial of the Constitutional right to trial by jury?

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Donald Kinney and Margaret Kinney, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit filed on October 21, 1982.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit was not reported. This opinion appears as Appendix, infra. The order entered by the United States District Court for the District of New Mexico was not accompanied by an opinion and was not reported. This appears as Appendix, infra.

PARTIES

Parties to the proceeding in the court whose judgment is sought to be reviewed were Donald Kinney, Margaret Kinney, State Farm Mutual Automobile Insurance Company, Arthur W. Teague, Manuel Mendoza, Garald W. Strickland, Thomas A. Simons, IV, Clement Vaughan, and Edward B. Rust.

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit was filed on October 21, 1982. Appellants thereafter filed a Petition for Rehearing en banc which was denied January 26, 1983. Appellants filed a Motion for Stay of Mandate on February 1, 1983, which was denied on February 15, 1983.

This Court has jurisdiction of this cause under 28 U.S.C. § 1254, as this is a Petition for Certiorari from a case in the United States Court of Appeals for the Tenth Circuit.

The 10th Circuit received the Case on Appeal from the United States District Court for the District of New Mexico where the case initiated.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendments 1, 5, 13, 14 to U. S. Constitution. Rules of Appellate Procedure 2, 3, 21, 40, 42 U.S.C. §1983, 1985 and 1986.

Appear in the Appendix

STATEMENT

"Statement of the Case" in Appellants' Brief in Chief to the 10th CCA on May 7, 1981 informed the 10th CCA that the case was a conspiracy under 42 U.S.C. § 1983, 1985, 1986, with the State Judicial Officials and in State Judicial Channels in these words:

> " **STATEMENT OF THE CASE**
>
> This case is an action by insureds against their own insurance carrier for the conduct of the insurer in conspiring with judicial officials in Bernalillo County, New Mexico, to violate Plaintiffs' legal and constitutional rights and for the bad faith conduct of the insurer which was in utter disregard for the rights of the plaintiffs. Several defendants filed Answers but no motion to dismiss was filed by any party. District Judge Santiago Campos, without any notice to the parties and without affording them any opportunity to be heard, dismissed the action for lack of jurisdiction on January 29, 1981. Notice of Appeal was filed February 27, 1981."

Above Statement of the Case in Brief in Chief appears in App. E as is Facts Relevant to the Issue Presented for Review, App. E and Statement of Issue Presented for Review, App. E. It is pointed out the "Issue" presented on Appeal is singular, App. D, and states "The issue presented is whether a District Judge can dismiss a Com-

plaint under § 1983, 1985, 1986, for lack of jurisdiction without giving any notice to the parties and without giving the parties any opportunity to be heard". The District Court order will be referred to as DISMISSAL and is in App. C. The Mandamus point was No-Hearing in any form, oral and written. General issue Answers filed by defendants raised no issue about dismissals and none of the six defendants had filed a Motion to Dismiss or Summary Judgment of any kind. Discovery had not even commenced. Judge Campos somehow selected this Civil Rights case on his own and Dismissed it. The Order said "he finds and concludes that there are not sufficient allegations in the Complaint to support the existence of Federal Court jurisdiction over this action". Prior to appealing Petitioner then filed a Petition for Mandamus in the 10th CCA on the No-Hearing issue and informed the Court in said Petition "The basis of that lawsuit (below) was that defendants, in concert with several State District Court Judges in Bernalillo County, New Mexico had conspired to violate Petitioner's legal and Constitutional rights". App. C. The Petition is set out in App. D, and the Complaint under § 1983, 1985, 1986, which was attached is in App. B. The conspiracy with State Judges was known to the 10th CCA from February 13, 1981, App. E, and a second time was so informed in writing on May 7, 1981, in Brief in Chief, App. E. Trial Judge Campos requested counsel for defendants to answer for him and suggested that the Mandamus be opposed on the grounds that an appeal was the proper remedy. Copy of letter by J. Campos is in App. I.

The 10th Circuit had ordered J. Campos to answer the Mandamus Petition. App. G. The Answer through attorney Mann for J. Campos raised the defense of ade-

quate remedy by "appeal", App. H, but did not deny that the dismissed case was one whereby "the defendants, in concert with several State District Court Judges in Bernalillo County, New Mexico, had conspired to violate Petitioners' legal and Constitutional rights", App. E, nor did the Answer deny the allegations of the Mandamus Petition that "Petitioners Complaint alleged that defendants had acted "under color of law" and in violation of 42 U.S.C. § 1983 and 1985". App. D. Petition for mandamus, App. D, also accurately stated "none of the answers alleged that the Federal Court lacked subject matter jurisdiction over this lawsuit nor did any of the Answers allege that Petitioners' Complaint failed to state a cause of action". App. D. No Motion had ever been made by any defendants to Dismiss.

The 10th CCA took jurisdiction of the Mandamus, Ordered an Answer, App. F, and then dismissed April 1, 1981, pursuant to J. Campos' suggestion because "Petitioners have an adequate appellate remedy". App. F. It was before Justices Barrett, McKay and Logan. J. Logan was not on the per curiam OPINION handed down more than 18 months later - October 21, 1982, on this Appeal, but he was a regular court member attending the Request for Re-hearing en banc and had knowledge from his role on the panel for Mandamus on April 1, 1981, that involvement with State of New Mexico judge was claimed in this § 1983, 1985 conspiracy. J. Hill was substituted. The Appeal process operated by written briefs with Reply Brief filed June 23, 1981. Sixteen months later the OPINION was filed NOT FOR ROUTINE PUBLICATION per curiam, App. A. Request for Oral Argument was denied. "Oral argument would not be material assistance in the determination of this appeal." App. A.

The Brief in Chief was solely on the no-hearing Dismissal issue wherein it cited numerous cases and Rules in support.

The Table of Authorities and the last two paragraphs are in App. E, which concludes by saying "The Order dismissing Plaintiff Complaint, entered without notice and without affording the Plaintiffs' one opportunity to be heard, must be reversed".

The above is done to show that Petitioners never agreed in their Appeal that the Court of Appeals could initiate a Motion to Dismiss for failure to state a claim and without Notice argue it to themselves and then decide it.

On January 26, 1983, the Motion for Rehearing en banc was denied. App. J. Petitioners filed for a Stay of Mandate under Rule 41(b). It was denied.

REASONS FOR GRANTING THE WRIT

A Hearing in trial court was Constitutionally and Legally Required. The AFFIRMANCE BY the 10th Circuit was an Endorsement of a 5th Amendment violation.

Notice and the opportunity to be heard are the essential elements of the Constitutional requirement of due process of law. *Powell v. Alabama*, 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55 (1932). *Postal Tel. Cable Co. v. Newport*, 247 U.S. 464, 62 L.Ed. 1215, 38 S.Ct. 566 (1918). Petitoners were given neither in this case. The District Court has deprived Petitioners of their right to due process of law by dismissing their Complaint without giving them notice that such action was even contemplated and with-

out giving them any opportunity whatsoever to be heard. A court can dismiss a complaint on its own motion. However, "a court may not do so without at least giving plaintiffs notice of the proposed action and affording them an opportunity to address the issue." *Literature, Inc. v. Quinn*, 482 F.2d 372 (1st Cir., 1973); *Clinton v. Los Angeles County*, 434 F2nd 1038 (9th Cir. 1970). In *Harmon v. Superior Court of California*, 307 F2d 796 (9th Cir., 1962), the complaint asserted Federal jurisdiction under 28 U.S.C. §1343 and 42 U.S.C. §§1983 and 1985 (2), the Civil Rights Act. The district court, on its own motion, dismissed the complaint for lack of jurisdiction without a hearing. The Court of Appeals found that such a dismissal was plain error and reversed. In explaining its ruling, the Court of Appeals stated:

> "The District Court has power to dismiss for lack of jurisdiction. It can do so at any time that such lack appears, and on its own motion . . .
>
> But it cannot dismiss for lack of jurisdiction without giving the plaintiff an opportunity to be heard . . .
>
> The claim may be, as appellees assert, entirely spurious. The complaint may well not state a claim upon which relief can be granted. It may be that appellant cannot amend to state such a claim. But those are not the questions before us. The court cannot know, without hearing the parties, whether it may be possible for appellant to state a claim entitling him to relief . . . The right to a hearing on the merits of a claim over which the court has jurisdiction is of the essence of our judicial system, and the judge's feeling that the case is probably frivolous does not justify by-passing that right."

Harmon, supra at 797-8, emphasis added. In *Cooper v.*

United States Penitentiary Leavenworth, 433 F.2d 596 (10th Cir. 1970), this Court relied on *Harmon*, supra, in reversing a lower court's failure to hold any hearing before dismissing a complaint for lack of jurisdiction. In *Winkleman v. New York Stock Exchage*, 445 F.2d 786 (3rd Cir., 1971), the defendant filed a motion to dismiss for lack of subject matter jurisdiction and an order of dismissal was entered the very same date. The record disclosed no service on plaintiff of the motion to dismiss, no hearing or opportunity for hearing. The Court of Appeals reversed the dismissal, holding that plaintiff was entitled to a hearing. In *American Federation of Musicians v. Bonatz*, 475 F.2d 433 (3rd Cir., 1973), the district court raised the issue of lack of jurisdiction on its own motion and dismissed the complaint. The Court of Appeals reversed, holding:

> "it was error for the district court to decide that issue with this record on a sua sponte rule 12 (b) (1) motion . . . (W)e have never departed from the rule that even on such an issue the record must clearly establish that after jurisdiction was challenged the plaintiff had an opportunity to present facts by affidavit or by deposition, or in an evidentiary hearing, in support of his jurisdictional contention."

American Federation of Musicians, supra at 437. In *Council of Federated Organizations v. Mize*, 339 F.2d 898 (5th Cir., 1964), the Court of Appeals reversed the lower court's dismissal of a complaint for failure to state a claim because the dismissal was ordered without a hearing. The court stated:

> "The dismissal of the complaint for failure to state a claim was . . . without a hearing and without an opportunity to be heard. The right of a litigant to

be heard is one of the fundamental rights of due process of law. A denial of the right requires a reversal."

Council of Federated Organizations, supra at 900-1. In *Urbano v. Calissi*, 353 F.2d 196 (3rd Cir., 1965), the district court, without any hearing, dismissed a complaint filed under the Civil Rights Act for lack of jurisdiction. The district court raised the jurisdictional issue on its own motion and after reviewing the complaint found no basis for jurisdiction. The Court of Appeals reversed, holding that "Plaintiff was entitled to an opportunity to be heard on the legal questions involved in the court's conclusion that the complaint should be dismissed." *Urbano*, supra at 197. In *Jordan v. County of Montgomery*, 404 F. 2d 747 (3rd Cir., 1968), the district court granted defendant's motion to dismiss without any hearing. The Court of Appeals reversed because plaintiff was not afforded any opportunity to submit arguments in opposition to the dismissal motion, either orally or in writing. The Court of Appeals stated that:

> "Defendants' motions were made pursuant to Rule 12(b), F.R. Civ. P. *Under Rule 12(d) F. R. Civ. P., they could not be decided without a hearing.*"

Jordan, supra at 748, emphasis added. *Dougherty v. Harpers's Magazine Company*, 537 F.2d 758 (3rd Cir. 1976), is in accord. The Court in *Dougherty*, at 760 held that "Rule 12(d), FRCP, requires that a Rule 12(b) (6) motion for dismissal . . . may be disposed of only after a hearing."

A motion to dismiss for lack of subject matter jurisdiction is governed by Rule 12 of the Federal Rules of

Civil Procedure. Rule 12(d) provides for preliminary hearings on such motions. Rule 12(d) clearly contemplates some sort of hearing on a motion to dismiss for lack of subject matter jurisdiction. The hearing requirements apply equally to motions raised by judges themselves and to those made by parties. As the Court of Appeals stated in *Herzog and Straus v. GRT Corp.*, 553 F.2d 789m 792 (6th Cir., 1977):

> "Fed. R. Civ. P. 56(c) requires that a motion for summary judgment be served at least ten days before a hearing is held. While this rule applies expressly only to summary judgment motions by a party, '(w)e think the spirit of the rule requires the same notice and hearing where the court contemplates summary dismissal on its own motion.' *Bowdidge v. Lehman*, 252 F.2d 366, 368-69 (6th Cir., 1958)."

The District Judge thus violated the Federal Rules of Civil Procedure, Rule 12(d) by not holding any hearing on a Rule 12(b) motion to dismiss for lack of subject matter jurisdiction. The judge also violated the local rules of the New Mexico Federal District Court. Local Rule 9(d) provides that any defense enumerated under Federal Rule of Civil Procedure 12(b) shall be considered as an opposed motion and the Court is to proceed according to the local provisions governing opposed motions. Rule 9(e) provides that in the case of an opposed motion, responding counsel shall have ten days after service to respond to the motion. Local Rule 9 was violated in all respects by the District Judge in this case. Plaintiffs were given no notice of the motion, contrary to Rule 9(g). Under Rule 9(d) this particular motion should have proceeded as an opposed motion. Plaintiff was given no opportunity to respond, contrary to Rule 9(e). The same notice and

hearing requirements which apply to motions by a party also apply to the court's own motions. *Herzog and Straus v. GRT Corp.*, supra. As has been stated above, it is well established that "(a)lthough a court may dismiss an action at its own instance . . . it must first afford the parties an opportunity to oppose the dismissal." *Preterm, Inc. v. Dukakis*, 591 F.2d 121 (1st Cir., 1979).

The District Judge's action in this case in effect does away with the private practice of law.

> The Opinion's Base for Affirmance "Plaintiff's Complaint does not state an actionable claim under § 1983" is erroneous, a violation of due process 5th Amendment, and a usurpation of lower Court function.

The OPINION arrives at its affirmance of a "no-hearing" Dismissal below by stating that the Complaint does not state a cause of action upon which relief could have ever been granted anyway. Strange solution to a claimed Constitutional 5th Amendment Point that should have been decided 18 months before in a Mandamus action. In popular language it says "do not worry about Constitutional issues like having a hearing, these can be overlooked since we have looked over the Complaint and decided without a hearing that it does not state an actionable claim under § 1983. App. A. This was as clearly a violation of the 5th Amendment as the District Courts Dismissal without a Hearing because the point on Appeal briefed was the due process violation and a request for oral argument to the 10th Circuit was denied. In both District and Appellate Courts there was a no-hearing violation.

The 10th CCA passed judgment on the Complaint as not stating a cause of action upon which relief can be

granted. They treated the Appeal as if a Motion to that effect under Rule 12(b) (6) had been filed in *their* court. No such Motion had been filed below. The lower court had not Dismissed on that basis. U. S. District merely said there were not enough facts in the Complaint "to support the existence of Federal Court Jurisdiction over this action". The trial judge did not file a Motion of his own. It is not known what he meant. The defendants had not filed a Motion to Dismiss, and had Answered without raising any such issue. No motive is found there for the Court's Dismissal. If the trial judge's reason for Dismissal is for failure to state a cause of action he erroneously labeled lack of Federal jurisdiction. A denial "due process", 5th Amendment, by denying an oppority to have a Hearing, oral or written, was the issue, "there are not sufficient allegations in the Complaint to support Federal Court jurisdiction". The trial judge finds something to be missing in the "allegations" of the sixteen page Complaint. He gives no indication of what the missing "allegations" are.

One year and nine months later an Opinion "Not for Rountine Publication" attempted to supply what had remained unspoken by the trial judge. Since the 10th CCA has no authority to decide a motion initially under Rule 12(b) (6), we have a unique situation where a case came to the appellate court on a trial judge's Dismissal brought on by the trial judge on his own motion and decided without a hearing or any notice as to what his Motion was an without any indication in his Dismissal except an unexplained lack of "sufficient allegations".

Opinion says two conditions concur, 1) the lack of jurisdiction appears on the face of the Complaint and, 2) it is obviously incurable.

An omission in the pleadings as J. Campos claimed is not a "lack of jurisdiction".

The 10th CCA claims that the defect is "obviously not curable". The denial of a hearing becomes not only a matter of a lack of due process but objectionable as barring the opportunity to amend, Rule 15. To label a Dismissal as lack of jurisdiction does not turn a Dismissal for some other basis into a jurisdictional one.

This Dismissal is not an exception to the rule which requires a Hearing. *Harmon v. Superior Court of California*, 307 F.2d 796. Opinion treated and decided the matter on Appeal as if it was a Motion to Dismiss under Rule 12(b) (6) for failure to state a claim, which was being argued and decided in their Court. This eliminates Rule 15. This is in itself a "lack of due process", 5th Amendment. Rule 15 uses a word "justice" and refers to amendments to pleadings for which "leave shall be freely given when justice so requires". There has been an unconstitutional denial of the opportunity to present "justice" to the Court. If a proposed amendment must be allowed when "justice so requires" then a denial of the right to even propose one is in itself a violation of "due process".

For the 10th CCA to assume the role of trial judge and evaluate the judgment as if there had been an argument below on a motion below under Rule 12(b) (6) would be a deprivation of "due process" on top of a deprivation of "due process" and would be a usurpation of a lower court function. The Constitutional issue of a "lack of hearing" was bypassed. This Petition to the Supreme Court of the United States is to give Petitioner their

original right of appeal from a Judgment of the U. S. District court since the 10th Circuit did not give an Appeal.

The wording of the Opinion falsely sums up the 16 page Complaint against 5 individuals as being one which solely claims a violation in "State Farm's decision to substitute counsel". In the same paragraph the Opinion says that the Complaint alleges as a violation "making the decision to substitute counsel". Immediately thereafter Opinion shows its violation of due process and its role as the trial judge in this sentence "Manifestly, Plaintiff's Complaint does not state an actionable claim under § 1983." Further complete disclosure of their role in passing upon the Complaint under Rule 12(b) (6) as not stating a claim upon which relief can be granted is found in the footnote, p. 4. The first line says "Our reading of the Complaint persuades us that Plaintiff claims sound in tort or contract". Stated succinctly the Opinion panel all agree that they read the Complaint, studied it, analyzed it, recognized that jurisdiction under § 1983 was clearly alleged, but that they did not think there were sufficient allegations to state an actionable claim under § 1983.

The unconstitutional aspect appears from the use of "persuades". Persuasion applies to an argument the deprivation of which brought us to the 10th Circuit.

Petitioners point of Mandamus and Appeal still remains. Can a District Judge Dismiss without a Hearing a Complaint for failure to state a cause of action upon which relief can be granted?

The Opinion cites only three cases plus an additional one in the footnote. Conley v. Gibson, 355 U. S. 41, 45-46,

2 L.ed. 80, 78 S. Ct. 99 (1957), is the only authority given for the affirmation of a Dismissal by the trial court of a cause of action without a Motion and without a Hearing. The decision in Conley, supra, is directly opposite of the Opinion on all points. First in Conley there was a Motion which says "The respondents appeared and moved to dismiss the complaint". No Motion was made here and they answered. Secondly, *Conley*, supra, continues by saying that "several grounds" were given for the Motion and named them. Our case in the trial court listed no grounds for the Courts own Motion.

Conley v. Gibson, supra completely failed to support the Opinion and does contain some further additional statements, all opposite to the instant opinion and the term "substantial justice" is seen, p. 80, in a paragraph where the Rules of Civil Procedure are discussed.

Conley is voicing the demand to construe the Rules of Civil Procedure in all cases so as to do "substantial justice". The Plaintiffs below right to a hearing means two things, 1) a presentment of the law as applied to the facts of their Complaint which they could not possibly do until they have a Motion from some source telling them that their Complaint does not state a cause of action under § 1983. Secondly, the Rules of Civil Procedure, Rule 15, give them the right to Request an Amendment or Amendments and this could be before or after or during the hearing.

They had dismissed the Mandamus not because they denied it but because "it is concluded that Petitioners have an adequate appellate remedy". App. F. This was a judicial assurance of their appellate consideration of

"lack of hearing" below. This promise was not kept. It was eighteen months between the dismissal of the Mandamus and the Opinion on appeal. This is not an "adequate appellate remedy". App. F. A decision in Mandamus should have been made on the sole issue of no-hearing below. Petitioners filed a timely Appeal in the 10th Circuit in order to preserve our right to appeal.

Conley v. Gibson, supra, has assertions like "The respondents also argue that the Complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper". This was rejected in these words "The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he basis his claim. To the contrary all the Rules require is "a short and plain statement of the claim ..." Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues."

Conley v. Gibson, supra, rejects this 10th CCA method. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits".

A judge cannot prevent discovery in a case of this kind. Inherent in the Dismissal is an unconstitutional denial of every procedure available under the Rules of Civil Procedure. This means elimination of Motion of all

kinds, every type of Discovery, any type of Amendment, every type of Joinder, Affidavits etc. Opinion says that the defect "is obviously not curable". This is to substitute judicial imagination.

The Rule on Dismissal, Rule 41, gives no authority for this Dismissal. Rule 41(b) refers to "any dismissal not provided for in this rule" and then refers to a dismissal for "lack of jurisdiction" which also fails to support this Dismissal.

Of significance is the statement in the Mandamus Petition that "The basis of the lawsuit was that the defendants in concert with several state district court judges in Bernalillo County". App. p. D. Under Civil rights litigation there is judicial immunity for judges but a conspiracy which involves private persons named defendants, with someone who performs a state function always qualifies as a § 1983, 1985 violation. *Dennis v. Sparks*, supra. To name the judges as defendants or to refer to them directly in the pleadings is not required.

Dennis v. Sparks, supra, says "the potential harm to the public from denying immunity to co-conspirators is outweighed by the benefits of providing a remedy against those private persons who participate in subverting the judicial processes and in so doing inflict injury other persons." Unless civil rights are to be submerged, the Federal Courts must afford a "due process" forum for the litigation. Civil rights acts do not automatically accomplish the objectives of the legislation. To use the term "patently frivilous" as applied to a § 1983, 1985 Complaint where a hearing was denied and the case selected by the trial judge for his own motion and dis-

missal "because there are not sufficient allegations in the Complaint" is to say that the Federal District Courts too can end civil rights litigation in New Mexico.

The use of the term "patently frivilous" becomes a method whereby a "due process" judicial violation is attempted to be screened by a judicial demeaning of the Petitioners themselves. Judicial disregard of established precedents of basing a decision on cases which truly support the Court's arguments is another method contra "due process".

When overwhelming authorities cited by appellant denouncing a denial of a hearing are not even mentioned much less distinguished and when the only case, *Conley v. Gibson*, supra, holds the opposite to the decision and when an Opinion of the Supreme Court, *Conley*, supra, is falsely used as an authority supporting the denial of due process for a lack of a hearing, in the District and Appellate Courts is evident.

ARGUMENT: Denials of Due Process Evidence Discrimination within Judicial Process.

The Opinion selects its own approaches. Standard appellate doctrine for reaching a decision was discarded.

"Reason and authority" is the standard approach. To use the authority of *Conley v. Gibson*, supra, is more than denial of the appellate method. An opportunity to review *Conley v. Gibson's* false use was given by the Motion for Rehearing, App. K.

As to "reason" being a guide for appellate decisions, the use of the terms "patently frivolous" and "obviously

not curable" with no explanation of how such conclusions were reached, eliminates "reason" as a basis for the Opinion.

Dismissal of Petitioners' action herein makes private parties immune because judges are involved. Judicial immunity is extended in direct conflict with *Dennis v. Sparks*, supra.

As indicative of denial of due process 5th Amend. We ask the following: Why was the case called up on the Court's own Motion and dismissed without a hearing? Why would the CCA dismiss Mandamus after it had called for an Answer? Why would the CCA rule that an adequate appellate remedy existed and project the case into an 18-month delay? Why did the 10th Circuit refuse to consider the sole point raised by appellant's brief in chief viz right to a hearing? Why did the Opinion cite *Conley v. Gibson*, 355 U. S. 41 in support of a Dismissal upon the "court's" own motion without notice and hearing when in fact it holds just the opposite? Why did the 10th CCA determine "unanimously that oral argument would not be of material assistance in the determination of the appeal"? Why did the 10th CCA refuse to acknowledge what was told them in Petition for Mandamus, p. 2, that "the basis of the lawsuit was that the defendants in concert with several state district court judges in Bernallilo County, New Mexico, had conspired to violate Petitioner's legal and constitutional rights?

Most essential sentences in the Opinion are unsupportive or false and incorrectly applied to the fact as stated in the Complaint.

One illustration occurs when the Opinion wrongfully

sets up two separate requisites for a § 1983 action. It also incorrectly uses the term "jurisdictional requisite". A failure to state a cause of action upon which relief can be granted is not a jurisdictional question as that term is used in the Rules of Civil Procedure. Lack of jurisdiction has its own separate provision under Rule 12. The common use of the term "lack of jurisdiction" means something more radical, like failure of diversity jurisdiction, or like a Complaint for a Divorce in Federal Court, or a claim for Workman's Compensation filed in Federal Court. This is what is meant by a "defect" appearing on the face of the Complaint.

Bell v. Hood, 327 U. S. 678, 66 S. Ct. 773, 90 L. ed. 939, gives a full explanation on "jurisdiction" which contradicts the Opinion. At page 775 this language appears, "Whether or not the complaint as drafted states a common law action in trespass made actionable by state law, it is clear from the way it is drawn that petitioners seek recovery squarely on the grounds that respondents violated the fourth and fifth amendments. Also the District Court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recovery under the Constitution and laws of the United States." Our complaint claims recovery for violation of § 1983, 1985, 1986, Federal statues and violation of the 13th and 14th amendments to the Constitution of the U. S. The Opinion labels the action a state tort law case, which is not the court's prerogative. *Bell v. Hood* says ' the party who brings this suit is master to decide what law he will rely upon" citing *The Fair v. Kohler Del & Specialty Co.*, 228 U. S. 22, 25, 33 S. Ct. 410, 411, 57 L.ed. 716. *Bell v. Hood* continues, "Jurisdiction therefore is not defeated as respondents seem to contend by the possibility that the averments

might fail to state a cause of action on which petitioners could actually recover. Whether the complaint states a cause of action on which relief can be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy".

The Opinion cites *Conley v. Gibson*, as supporting its assertion that "A complaint may be dismissed upon the Court's Motion without Notice and hearing where "it appears beyond a doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief".

Justice Black did not say that a complaint may be dismissed upon the Court's own Motion without notice and hearing where, etc. Therefore the statement is plainly false and a complete distortion of what Justice Black said. The Opinion directly maligns *Conley v. Gibson*, supra, on a doctrine of law and on what Justice Black said.

The Opinion attached its own addition to the rule and gave *Conley v. Gibson*, supra, the discredit for doing it.

It was correctable because in the Motion for Rehearing it was brought to their attention and they denied the Motion, App. K. Petitioners assert that this is a misuse of a judicial procedure. Rule 40. The per curiam Opinion does not mention that Justice Black's decision was a *refusal* to dismiss for failure to state a claim.

The following impropriety within the Opinion also evidences a denial of "due process" 5th Amend.

The Opinion says p. 3, 2nd para., "While the com-

plaint does allege a deprivation of due process under the Fourteenth Amendment, the right to due process is secured against infringement only by governmental action, not by private action such as State Farm's decision to substitute counsel". This is false on the law and a distortion of the Complaint. As to the law, *Dennis v. Sparks*, says "Private persons jointly engaged with State officials in the challenged action are acting see "under color of law" for purposes of § 1983 actions. *Adickes v. S. H. Kress*, 398 U. S. 144, 152, 90 S. Ct. 1598, 1605, 26 L.ed. 2d 142. See also *White v. Bloom*, 621 F.2d 276 (1980) (10th CCA), and *Norton v. Liddell*, 620 F.2d, 1375 (1980) (10th CCA). The factual falsity in the Opinion is to identify "State Farm's decision to substitute counsel" as the wrong alleged. Para. XI of the Complaint says "To substitute attorneys at this time is a gross negligence . . . and *because of the way it was done*, it constitutes a violation of plaintiffs' constitutional and legal rights under 42 U.S.C. § 1983, 1985, 1986 and was done under color of law". The Opinion falsely labels the State Farm "decision" as the violation under § 1983. It totally fails to be fair to Petitioners' allegations, and misstates them, and uses ridicule to say "the allegation is therefore patently frivolous". This is a denial of "due process". App. B, p. 34.

As an additional evidence at this point, reference is made to the suggestion in the footnote, App. A, that Petitioners may have a valid claim in State Court. If litigants had been able to get justice in State Courts they would have no need to use § 1983, 1985. App. A. This advice to go to State Court by the 10th Circuit cannot be a proper suggestion and ignores reality. App. E.

It was erroneous for the Opinion in the footnote to say

"the complaint persuades us that Plaintiffs' claims of wrongful conduct sound in tort or contract". The Opinion equates a contract or a tort of negligence as being the allegations of constitutional wrong-doing under § 1983, 1985. The failure of the Opinion is to correctly relate the allegations of the Complaint Para. XI., App. B, p. 34, 35.

The failure of the Opinion to mention allegations of a conspiracy under § 1985 further shows structuring of Opinion at variance with the lawsuit as filed; even the profession is denied access with the possibilities of objection by the "Not for Routine Publication".

Another example within the Opinion is found in this assertion, "Furthermore there is no allegation whatsoever that State Farm or the individual defendants were acting under color of state law in making the decision to substitute". This is calculated to create a false impression, which can be defended literally because the Complaint alleges "under color of law" many times, but does not say under "color of State law". Everyone in legal circles uses under "color of law". The Complaint, Para. XIV, App. B, says "to force him upon Plaintiffs and to force him into control of litigation by fraudulent and oppressive measure, in violation of Plaintiffs' constitutional and legal rights, which violates § 1983, 1985 *under color of law*".

The specifics of "color of law" need not all be pleaded. Rule 8: The 10th Circuit had been informed since February 13, 1981, that the basis of the litigation "was that the defendants in concert with several state District Court judges in Bernalillo County, New Mexico, had conspired to violate Petitioners' legal and constitutional rights". App. F.

The Opinion does make an admission that "the complaint does allege a deprivation of due process under the Fourteenth Amendment". This appears numerous times in the Complaint, App. B, but the Opinion omits to say a violation of the 13th Amedment is also claimed, para. XVII, App. B.

Having admitted allegations of Constitutional violations under the 14th Amendment, the Opinion admitted the legal sufficiency of the allegations behind the violation and since on numerous occasions the Complaint stated that these violations were "in violation of 42 U.S.C. 1983, 1985", (In Para. XXIII, App. B, as one example), the Opinion actually admits that the Complaint states a cause of action.

In *Tessman v. McCormack*, 591 F.2d, 605, 612, the 10th Circuit case cites *Conley v. Gibson* for its holding. It uses this appropriate language, "In many cases of conspiracy essential information can only be produced through discovery and the parties should not be thrown out of court before being given an opportunity through that process to ascertain whether the linkage they think may exist actually does". The present Opinion is per curia and Not for Routine Publication. The author is not named. There is a conflict within the 10th Circuit. Amongst others the Opinion says *Conley v. Gibson*, supra, authorizes a Dismissal without a hearing, and *Tessman v. McCormack* cites it to say that parties "should not be thrown out of court before being given an opportunity through that process to ascertain whether the linkage they think may exist actually does". *Conley v. Gibson*, supra, is the sole support of the Dismissal without a hearing, its use was to destroy the plaintiffs' "right to

be heard". This would violate the 5th Amendment by violating the 1st Amendment.

Norton v. Liddell, supra, said "the fact that the state official is immune from suit in damages should not provide a windfall defense to the private conspirator." In that case the immunized state official was an Oklahoma sheriff. *Norton*, supra was also a case of alleged misuse of judicial procedure. Petitioners' case represents a serious violation of constitutionally protected rights and liberties. Petitioner in his Complaint, para 17, also alleged violation of the 13th Amendment, U. S. Constitution, because of the force exerted by the conspirators to make defendant Simonds his attorney, thru the instrumentality of State of New Mexico judges and the establishment of a new Court just for that purpose. Petitioners allege that this was the type of force comparable to a forced employer-employee relationship.

The Opinion, therefore, talks about lack of "jurisdiction", saying "In an action under 42 U.S.C. § 1983, the Plaintiff must first satisfy two jurisdictional requisites."

The word "satisfy" becomes "allege" and "failure to state a claim" becomes "lack of jurisdiction". To insert two cases after the shift from "satisfy" to "allege" is to add confusion since neither case is relevant to the instant case on the facts and since neither *Lugar v. Edmondson*, U.S., 73 L.ed. 2d., 482, 102 S.Ct. 2744, or *Flagg Bros. v. Brooks*, 436 U. S. 149, 56, L.ed, 2d. 185, 98, S.Ct. 1729, had a Dismissal without a hearing. There was discussion in *Lugar*, supra, about "color of law" and "state action". Lugar, supra, is present controlling activity on a warehouseman's lien under a § 1983 action, but is a totally unrelated case to a conspiracy wherein Plaintiffs

were deprived of their 13th and 14th Amendment rights under color of law and in state judicial chambers. Lugar dealt with a statute, presumably valid, not with oppresive measures in state judicial channels.

"OBVIOUSLY NOT CURABLE" AS USED IN OPINION IS INCORRECT.

Petitioners in their § 1983, 1985 suit had no desire to create publicity against state judges. Their purpose was the protection and vindication of their rights protected by the Constitution and laws of the United States. This Complaint was filed within 30 days of the initial execution of the conspiracy. Involvement of state officials was present. The plan "was continuing" as the Complaint point out, para. XVI, and only partially known, App. B, D, E, O.

The Opinion's "not curable" conclusion solicits contradiction as appellate speculation into a real factual pattern in which Petitioners existed. The same right to "due process" and "free speech" denied so often entitles them to contradict the speculation as follows:

Plaintiffs could show that in furtherance of the conspiracy the defendant Simonds, a New Mexico lawyer, wrote a secret letter to the administrative head Judge for Bernalillo County in execution of the conspiracy, asking for his help as a judicial official in carrying out the plan to control the litigation thus pending in State Court wherein the Petitioner here was a party. This State judge did accede to the letter request and did use his judicial position to aid the execution of the plan. In furtherance of the plan, State judges set up an entire separate court which was unconstitutional and wholly unauthorized for the sole purpose of aiding the defendants in their plan against

the Petitioner. This illegal court did function solely to execute the Conspiracy and then never functioned again.

Petitioners attach App. N a State Judge letter refusing a tape of the No-hearing, no Notice proceeding referred to therein. Truth is the objective of all judicial proceedings. Southern Pacific Railway v. Ralston, 67 F2 958, 10th CCA. No hearings at State and Federal levels have frustrated the search. Civil rights litigation are struggles for freedom. If exceptions are made anywhere the "cause" suffers everywhere. Quote from a Federal official in a local New Mexico paper, 2-21-83, is apt "people who simply don't believe in the laws they're appointed to administer". Keeping bad conditions secret is a historical pattern in Civil Rights causes. Petitioners request assistance.

IN CONCLUSION

The question of subject matter jurisdiction is decided even by the Docket Sheet which under CAUSE says 42 U.S.C. Sections 1983, 1985, 1986. Plaintiffs claim damages under Civil Rights Statutes. App. O.

Also a form approved by the Judicial Conference of the U. S. in 1974 and which "is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet" was used by the Clerk's office in this case and under BASIS OF JURISDICTION, we find that Federal question is marked. Under CAUSE OF ACTION, 42 U.S.C. §1983, 1985, 1986. Plaintiffs claim damages as provided in the above statutes. App. O.

Since §1983, 1985 1986 are Acts of Congress and since the forum designated by the Statute is the United States

District Court, and since the Complaint identifies itself as a § 1983, 1985, 1986 cause of action, then subject matter jurisdiction of the United States District Court is not debatable. The Opinion conclusion that "The jurisdictional defect appears on the face of the Complaint" is wrong.

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APPENDIX A

NOT FOR ROUTINE PUBLICATION
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
OCT 21 1982

DONALD KINNEY and MARGARET KINNEY,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 81-1264
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
For the District of New Mexico
(D. C. No. 80-0630C)

Submitted on the briefs pursuant to Tenth Circuit Rule 9:

Eugene E. Kleean and Janet Santillanes of Klecan & Roach, P.A., Albuquerque, New Mexico, for Plaintiffs-Appellants.

Russell D. Mann of Atwood, Malone, Mann & Cooter, P.A., Roswell, New Mexico, for Defendants-Appellees.

Before BARRETT, HILL and McKAY, Circuit Judges.

PER CURIAM.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the

determination of this appeal. *See* Fed.R.App.P. 34(a); Tenth Circuit R. 10(e). The cause is therefore ordered submitted without oral argument.

This is an appeal from the order of the district court dismissing plaintiffs-appellants' complaint. Donald Kinney, plaintiff in this action, was sued in state court by Irene Luther for wrongful death of her husband arising out of an automobile accident. Kinney was insured by State Farm, who selected the law firm of Klecan and Roach to represent him in the state lawsuit. The jury returned a verdict in favor of Kinney, which was appealed on the grounds of erroneous jury instructions.

While the appeal was pending, State Farm terminated the services of Klecan and Roach and substituted Thomas A. Simons, IV as counsel for Kinney. Because Kinney was being sued for damages in excess of the policy limits, State Farm and Mr. Simons advised him that he could choose to retain independent counsel at his own expense. (ROA, Vol. 1, at 17, 40, 42, 43). Kinney and his wife, Margaret, then brought this action for damages pursuant to 42 U.S.C. § 1983 for alleged unconstitutional interference with an existing attorney-client relationship. The district court, on its own motion, dismissed the complaint for lack of federal jurisdiction. Plaintiffs now appeal, arguing that the district court erred in dismissing the complaint on its own motion without affording the parties an opportunity to address the jurisdictional issues.

In an action under 42 U.S.C. § 1983,[1] the plaintiff must satisfy two jurisdictional requisites. First, he must allege the violation of a right "secured by the Constitution and

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1. 42 U.S.C. § 1983 provides in full:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

laws" of the United States, in other words, state action. Lugar v. Edmondson Oil Co., 102 S.Ct. 2744, 2747 (1982) (quoting Flagg Brothers, Inc. v. Brooks, 436 U. S. 149, 155-56 (1978)). Second, he must show that he was deprived of this right by a person acting "under color of" state law. *Id.*

In this case plaintiffs have alleged neither state action nor action under color of state law. While the complaint does allege a deprivation of due process under the Fourteenth Amendment, the right to due process is secured against infringement only by governmental action, not by private action such as State Farm's decision to substitute counsel. This allegation is, therefore, patently frivolous. Furthermore, there is no allegation whatsoever that State Farm or the individual defendants were acting under color of state law in making the decision to substitute counsel. Manifestly, plaintiffs' complaint does not state an actionable claim under § 1983.[2]

A complaint may be dismissed upon the court's motion without notice and hearing where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U. S. 41, 45-46 (1957). The jurisdictional defect appears on the face of the complaint and is obviously not curable. Under the facts of this case, the district court did not err in dismissing the complaint on the pleadings. We therefore affirm the judgment of the district court.

AFFIRMED.

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2. Our reading of the complaint persuades us that plaintiffs' claims of wrongful conduct sound in tort or contract. If State Farm's action in substituting counsel was a breach of the plaintiffs' insurance contract, § 1983 does not afford a remedy. And if plaintiffs' claims are true, defendants might be liable in tort for negligence, infliction of emotional distress, fraud, or interference with a fiduciary relationship. Section 1983 was not intended to provide an alternative forum for adjudicating state-law tort claims. See Brown v. Schiff, 614 F.2d 237, 239 (10th Cir.), cert. denied, 446 U. S. 941 (1980).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DONALD KINNEY and MARGARET KINNEY,

Plaintiffs,

CIV 80-0630C

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ARTHUR W. TEAGUE, MANUEL MENDOZA, GERALD W. STRICKLAND, THOMAS A. SIMONS, IV, CLEMENT VAUGHAN, and EDWARD B. RUST,

Defendants.

COMPLAINT

I.

COME NOW the plaintiffs, Donald Kinney and Margaret Kinney, and for cause of action against the defendants, state:

That they are citizens of the United States of America and of the State of New Mexico where they reside. That they are husband and wife.

II.

That defendant State Farm Mutual Automobile Insurance Company (hereinafter State Farm Auto Co.) is an Illinois corporation . . .

III.

. . . The title of the highest ranking claims superintendent in New Mxeico is . . . Arthur W. Teague, who participated in the decisions . . .

IV.

Strickland is Regional Vice President, resident in Tempe, Arizona, and who authorized and participated in the violation of plaintiffs' civil rights . . .

V.

That Manuel Mendoza resides in Bloomington, Illinois . . . participated in the plan to deprive the plaintiffs of their civil rights. Manuel Mendoza is a lawyer but is not authorized to practice in New Mexico.

VI.

That defendant Clement Vaughan is the highest ranking official in State Farm Auto Co.'s regional office located in Tempe, Arizona, and is a resident of the State of Arizona, and is a lawyer and full-time employee of State Farm Auto Co.

VII.

That Edward B. Rust is President of State Farm Auto Co., resident at the company headquarters in Bloomington, Illinois, which is the state of incorporation of State Farm Mutual Automobile Insurance Company, and was continuously made aware through general counsel for State Farm Auto Co. of the events hereinafter alleged.

VIII.

That the defendant, Thomas A. Simons, IV, is an attorney at law duly licensed to practice law in the State of New Mexico since 1973. . .

IX.

The plaintiffs . . . State Farm Auto Co. insureds as to a liability policy on their car, which was allegedly involved in an accident. . . occurred on November 3, 1978, in . . . New Mexico, . . . Kinney was sued for wrongful death damages in excess of one million six-hundred thousand . . . trial resulted in a verdict for Donald Kinney on April 11, 1980. . . . appeal was taken against . . . Kinney and is pending, . . . the trial attorney would have the only first-hand knowledge.

X.

Pursuant to policy conditions, State Farm Auto Co. . . . designated Klecan & Roach, P.A. . . . to defend the case, . . . throughout a long course of judicial steps before trial, and as stated above during the trial. . . the above attorney efforts produced . . . success for the plaintiffs herein and State Farm . . . State Farm Auto Co. did not have to pay damages . . . because of the successful defense.

XI.

Defendant Thomas A. Simons, IV has no knowledge of the case. To substitute attorneys at this time is gross negligence and wanton and flagrant disregard of the plaintiffs' rights, and because of the way it was done, it constitutes a violation of plaintiffs' constitutional and legal rights under 42 USC §§1983, 1985, and 1986, and was done under color of law as hereinafter alleged. This Court has jurisdiction under the aforesaid sections.

XII.

For reasons totally apart from the lawsuit wherein Donald Kinney was the successful defendant and wherein State Farm Auto Co. had to pay nothing, defendants have embarked upon a course of conduct in deprivation of the civil rights of the plaintiffs as will be hereinafter alleged. That defendants have no justifying reason for their activities in derogation of the civil rights of the plaintiffs.

XIII.

That in the lawsuit wherein said Thomas A. Simons, IV sought to grasp control, State Farm Auto Co. disclaimed any responsibility for punitive damages under the policy. There were punitive damages sought in the lawsuit in a large sum at a personal judgment against Donald Kinney. The community property of the plaintiffs herein was and is threatened, and Margaret Kinney was exposed to loss as a co-owner of all community property.

XIV.

In addition, State Farm Auto Co.'s policy was limited, and excess in a huge sum over the policy limits was sought by the plaintiff in the wrongful death claim against Donald Kinney. . . .

That this fear . . . is present again if there is a successful appeal against Kinney. That plaintiffs herein were and are involved in every way more than State Farm Auto Co.

That this action by defendants had in fact produced great anxiety, fear, and suffering on the part of the plaintiffs, not only as to their potential financial loss of all funds and business in which they jointly share in earnings and actual operation, but also has been the cause of a great fear and mental suffering that the pending appeal in the appellate court of New Mexico will be lost because of the assumption of control by defendants, Through Thomas A. Simons, IV, and that they will be exposed to a second trial with a renewal of tremendous anxiety and suffering. Attorney Thomas A. Simons, IV has no experience or reputation at all comparable to Klecan & Roach, P.A., and it is gross negligence to force him upon plaintiffs and to force him into control of the litigation by fraudulent and oppressive measures, in violation of plaintiffs' constitutional and legal rights, which violates §§1983, 1985, under color of law.

XV.

That because the accident of November 3, 1978 resulted in death, and because of the resulting potential of criminal proceedings, the attorney-client relationship between Donald Kinney and Klecan & Roach, P.A. was a very sacred, confidential relationship with many duties imposed upon the attorneys, and requiring a great amount of mutual trust and requiring a high standard of ethical responsibility by Klecan & Roach, P.A. to Donald Kinney.

XVI.

That State Farm Auto Co. representatives Arthur Teague, Manuel Mendoza, and Gerald Strickland, with full

knowledge of the damaging effect upon plaintiffs' rights, combined and conspired, for reasons totally apart from the litigation in which the plaintiff Donald Kinney was a party, to violate the constitutional and legal rights of the plaintiff. It was planned and executed in wanton disregard of plaintiffs' rights and in violation of §§1983, 1985.

That as plaintiffs were resting securely in their attorney-client relationship with Klecan & Roach, P.A., State Farm Auto Co., acting through its aforesaid representatives, caused a letter to be written to the plaintiffs, which is attached hereto as Exhibit A. Said letter constitutes numerous violations of plaintiffs' constitutional and legal rights under color of law and in violation of §§1983, 1985. That under color of law to force apart the legal relationship of Klecan & Roach, P.A. as attorneys for the plaintiff herein at this stage of the litigation is to violate the civil and constitutional rights of the plaintiffs. This, State Farm Auto Co. has attempted to do and is continuing to attempt.

That the combination and conspiracy as to its objective, i.e. the separation of attorney-client relationship, has a further violation, damaging as to the plaintiff herein in that the control of the actual litigation and the steps to be taken is removed from the attorney-client relationship of the plaintiff herein and Klecan & Roach, P.A., and plaintiffs are being forced into an attorney-client relationship with defendant Thomas A. Simons, IV, who threatens to pass plaintiffs on to another mysterious attorney, Exhibit A.

XVII.

That plaintiffs allege that intentionally, maliciously, and with wanton disregard of the consequences, the defendant State Farm Auto Co. has acted in violation of the Thirteenth Amendment of the Constitution of the United States by forcing an attorney upon your plaintiffs, and has acted in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

That the combination and conspiracy to take control of the litigation and the exclusion of Klecan & Roach, P.A. from said control invades the confidentiality of the attorney-client privilege with all of its safeguards, and violates the plaintiffs' constitutional rights.

The denial of any choice, even the right to assent or dissent, or to be heard, constitutes a further instance of violation of §§1983, 1985, with damages to the plaintiffs.

Plaintiffs allege that State Farm Auto Co. is acting in complete bad faith as to their rights, and have denied them every semblance of due process. That to turn him over to an attorney . . . is indicative that his rights are being sacrificed for a revengeful company policy which is blind to any rights in the plaintiffs and violates them in a grossly wanton manner.

XVIII.

That the letter, Exhibit A, and the actual program of Thomas A. Simons, IV seeks to and does reduce plaintiffs to the status of persons not covered either by the Thirteenth Amendment or the Fourteenth Amendment to the Constitution of the United States of America. This is so because Thomas A. Simons, IV, under color of his law license, has said they have no choice but to turn over their attorney-client relationship in which they as persons who are clients have no rights and are completely under his dominance as their attorney at law. This is a deprivation of their civil rights as citizens of the United States of America, for which damages for the wrongful invasion of a protected right are sought.

XIX.

That as part of the plan conceived by State Farm Auto Co. and in the execution of which they used the attorneyship of Thomas A. Simons, IV for execution, the said attorney Thomas A. Simons, IV inserted into the letter sent through the mails to the plaintiff Donald Kinney an Entry of Appearance, Exhibit B. This constituted a use of a legal document in which the defendant Thomas A.

Simons, IV, wrongfully under color of law, forced himself upon the plaintiffs and the lawsuit as an accomplished fact, and denied to the plaintiffs any opportunity to agree, disagree, question, or be informed as to who had suggested or authorized the same.

This constituted an illegal and oppressive use of the administration of justice in the state of New Mexico and was in violation of the civil rights of the plaintiffs herein.

XX.

That as part of State Farm Auto Co.'s plan to deprive the plaintiff Donald Kinney of his civil rights, said defendant, acting through its agents, caused attorney Thomas A. Simons, IV to send the letter (Exhibit A), which was suggestive of the fact that attorneys Klecan & Roach, P.A. had agreed to the substittuion of attorneys and to their withdrawal from the case. This veiled insinuation was calculated to deceive the plaintiffs and thus to effect a substitution of attorneys. That the plaintiffs were deceived and have suffered great anguish and anxiety by temporarily believing that they had been abandoned by their successful attorneys, Klecan & Roach, P.A., in whom they reposed their greatest confidence. This anxiety was increased by the brash and unauthorized attempt to take over the lawsuit by the said Thomas A. Simons, IV, of whom they knew nothing. Exhibit A is the letter.

XXI.

That by using the attorneyship of Thomas A. Simons, IV, State Farm Auto Co., acting through its representatives, caused the said Thomas A. Simons, IV to act in violation of the Canons of Ethics for Professional Responsibility, which expressly prohibits a direct contact with a party to a lawsuit who is represented by an attorney. That statutory law, NMS 1978 Annotated, Judicial Volume 2, was violated under color of law. That Exhibit A constituted an intentional interference by Thomas A. Simons, IV into the attorney-client relationship and constituted duress against the plaintiff and was an attempt to destroy

the attorney-client relationship and appropriate the plaintiff Donald Kinney as a client of said Thomas A. Simons, IV, by false and oppressive means and without a hearing of any kind.

That State Farm Auto Co., acting through its members, have been warned that Exhibit A would be a breach of the Code of Professional Responsibility, supra, as adopted by the Supreme Court of New Mexico. That with full knowledge of this, State Farm Auto Co., acting in combination with its representatives, intentionally violated said Code and caused the said Thomas A. Simons, IV likewise to do so and acquiesce and ratify the conduct. That said action was in violation of plaintiffs' constitutional and legal rights, compensatory and punitive damages lie, all of which was in violation of 42 USC §§1983, 1985.

That Exhibit A constituted an improper use of force and intimidation and was designed by State Farm Auto Co., acting through its agents in combination to prevent and impair plaintiffs in the exercise of their constitutional and legal rights. That said Exhibit A was an attempt to prevent the plaintiffs herein from objecting by an appearance in court or through legal proceedings by the authoritarian tone of Exhibit A and constituted a plan to impede, hinder, and obstruct justice within judicial channels, all in violation of 42 USC §§1983, 1985.

XXII.

In Exhibit A, Thomas A. Simons, IV addressed plaintiffs in tone and in words indicative of no rights in the plaintiffs except to yield to the authoritative takeover of plaintiffs' litigation and indicative of no choice in the plaintiff Donald Kinney except to accept Thomas A. Simons, IV as his attorney. This constituted a fraudulent and oppressive interference, designed to eliminate opposition and constitutes an attempt to impair the constitutional and legal rights of the plaintiffs herein relative to himself as a client and his interest in the lawsuit in which he was the defendant. State Farm Auto Co., through its represen-

tatives and the use of the attorneyship of Thomas A. Simons, IV, thus acted in violation of 42 USC§§1983, 1985. That the same was intentional and with reckless disregard of the plaintiffs' rights.

That the violation of plaintiffs' rights was aggravated by the use of an attorney's position and station to create the impression that judicial authority was behind the letter, Exhibit A, and that it would be therefore useless to question it. That the impression that the attorney was an official spokesman of judicial authority was a violation under color of law.

That the letter indicating the accomplishment of a judicial fait accompli from an unknown attorney violated the privacy of both plaintiffs herein and constituted an illegal attempt without even a personal presentation to establish the personal, confidential relationship of attorney and client.

That in furtherance of State Farm Auto Co.,'s plan to deprive plaintiffs of their civil rights, no explanation came from State Farm Auto Co.'s offices to the plaintiffs about Thomas A. Simons, IV's authority to substitute himself as counsel. This is contrary to established State Farm Auto Co. procedures even as to the designation of attorneys at the outset of litigation.

That defendant Arthur Teague as the representative who would be in charge of such endorsements of initially selecting an attorney, knew of the custom and practice, and refrained from any communication to the plaintiffs but directed Thomas A. Simons, IV to use the mails directly from the attorney's office in Santa Fe to the plaintiffs.

That all concerned have or should have known that to use the attorney-client relationship in the courts as a depository for an indeterminate time was to engage in the unauthorized practice of law while violating the civil rights of the plaintiffs herein. See Exhibit A.

That the above course of conduct constituted an at-

tempted interference in the movement of justice since the litigation was proceeding, and Exhibit A called for its termination until permanent undesignated counsel was secured.

That the plan being executed was to force Thomas A. Simons, IV upon the plaintiffs, who would admittedly do nothing as an attorney but who purported to bar anyone else from taking steps to further plaintiffs' cause.

XXIII.

That the use of an attorney's license against the public policy of the state was in violation of plaintiffs' rights to have a defense continuously throughout the period of litigation. Defendants have obstructed the defense.

The Entry of Appearance by defendant Thomas A. Simons, IV likewise is an abuse of process. The same had no benefit to the plaintiff except to hinder his defense. The same constituted an intentional use of an attorney license as a means of accomplishing a cessation of the defense.

That the aforesaid plan was designed to obstruct, impair, and destroy plaintiff Donald Kinney's civil rights, in violation of 42 USC §§1983, 1985.

That the procedure of interim substitution of Thomas A. Simons, IV shows State Farm Auto Co.'s combination and conspiracy as being an obstruction of justice against the public policy of the state and in violation of constitutional due process for an attorney to forcibly take control of litigation for the purpose of passing the clients on to another unknown attorney. Bad faith against the insured is alleged.

XXIV.

That having acted in concert with others, as was hereinbefore stated, §1985 has been violated.

That the actions of Thomas A. Simons, IV as described above were authorized, commanded and endorsed by State Farm Auto Co., acting through its representa-

tives Arthur Teague and Gerald Strickland and Manuel Mendoza.

That the specific plans and methods whereby the person and license of a New Mexico attorney was used as an instrument to attempt to deprive the plaintiffs of their civil rights as heretofore alleged was planned as to all of its aspects by State Farm Auto Co., and State Farm Auto Co. acted with complete and wanton disregard of the rights of the plaintiffs herein and with knowledge that they were jeopardizing the chances of success for the plaintiffs. That State Farm Auto Co. intentionally authorized the complete takeover and control of the plaintiffs' litigation with complete indifference to suffering, anxiety, and apprehension of the plaintiffs over their potential loss.

XXV

That State Farm carries on a national campaign of advertising calculated to induce people to invest their money in this mutual company and become policyholders as the plaintiffs did. . . . defendants have violated the civil, constitutional rights of the plaintiffs by showing no consideration for the plaintiffs.

XXVI.

That attached hereto is Exhibit C, which represents continuous, numerous violations of §§1983, 1985. Exhibit C is the external manifestation of the combination and conspiracy entered into by all the defendants to hinder, obstruct, and defeat justice for the purpose of denying plaintiffs their constitutional and legal rights.

That the same is done under color of law and represents the furtherance of a plan by State Farm Auto Co. to control the course of events in the Courts. That the obvious affect of Exhibit C is to effect a cessation of discovery and to create confusion and obstruction within the field of civil litigation wherein State Farm Auto Co. is the insurer, to the detriment of the plaintiffs.

Said letter fraudulently, with intent to deceive, indi-

cates that Klecan & Roach, P.A. have acquiesced in the substitution. Exhibit C is a form of an actual letter which was sent to all opposing counsel in cases wherein Klecan & Roach, P.A. represented State Farm's insureds. Such a letter was actually sent to opposing counsel in the plaintiffs' case and has caused confusion within all judicial proceedings and constitutes an impediment, hinderance, and obstruction to the due course of justice. That the request that any discovery be postponed as stated in Exhibit C is an obstruction of justice, especially when Thomas A. Simons, IV, the author of Exhibit C, has bound himself not to litigate but only to freeze judicial proceedings. See Exhibit A. That all paragraphs, but in particular the second to the last paragraph which takes control of the litigation with the opposing attorneys, constitutes a fradulent and oppressive procedure that said paragraph would indicate that existing counsel are in agreement when the author knew that they were not.

That the above constitutes a malicious use of process to the detriment of the plaintiffs herein who have the constitutional right to have their defense continued without cessation and without interference by the defendants acting in concert to insert attorney Thomas A. Simons, IV into the case and thus halt the due process preparations of the plaintiffs.

XXVII.

. . . President of State Farm Auto Co. was informed of . . . violations of 42 USC §§1983, 1985, and it was his duty as chief executive officer to act to prevent the same. Defendant Edward B. Rust is liable under 42 USC §1986. The same is true of defendant Clement

XXVIII.

That plaintiff Margaret Kinney, as a State Farm Auto Co. insured, has been addressed equally with her husband and is equally with her husband a person whom defendants have attempted to reduce to a position devoid of constitutional and legal rights as heretofore alleged under §§1983, 1985, and defendants have proximately

caused great anxiety, mental pain and suffering and great anguish of soul because of the rupture in their relationship with their attorneys and the injection of an inexperienced person into their case who is taking over absolute control of their case at a time when experienced and energetic counsel is vitally necessary. That the use of an attorney to halt the proceedings and do nothing but prevent action is not a true attorney. . . . That their business and community property is threatened by this illegal use of force. That to be required to disclose all matters to this attorney, who is not assuming a role of an attorney, is a cause of great confusion, fear, and suffering to the plaintiffs.

XXIX.

That plaintiffs have been damaged jointly and severally in the sum of one million dollars. Plaintiffs seek further aid of the Court as provided in §§1983, 1985, 1986, and that in particular that State Farm Auto Co. be declared to have extended coverage to an amount equal to any judgment, compensatory or punitive that might result.

That since the actions of the defendants as aforesaid were malicious and with wanton disregard of the consequences as to the plaintiffs, Donald Kinney and Margaret Kinney seek punitive damages in the sum of five million dollars against the defendants, jointly and severally.

WHEREFORE, plaintiffs jointly and severally pray judgment against the defendants, and each of them, for compensatory damages in the sum of one million dollars and for punitive damages in the sum of five million dollars. Attorney's fees are also requested pursuant to the law relative to civil rights and such other relief as has been requested hereinbefore and as is deemed advisable pursuant to the Civil Rights Act, together with costs.

KLECAN & ROACH, P.A.
Attorneys for Plaintiffs
Suite 520, Sandia Savings Buildings
Albuquerque, New Mexico 87102

Inappropriate Sections Omitted.

Exhibit A

THOMAS A. SIMONS, IV
Attorney at Law

Territorial Plaza
327 Sandoval, Suite 101
Post Office Box 2341
Santa Fe, New Mexico 87501
Telephone: (505) 988-4476

June 25, 1980

Certified Return Receipt

Mr. and Mrs. Donald Kinney
315 Amherst, SE
Albuquerqu,e New Mexico 87106

Re: Irene Bentley Luther vs. Donald Kinney
Bernalillo District Court No. CV-79-02277
Satte Farm Claim # 31-0278-125

Dear Mr. and Mrs. Kinney:

Enclosed please find a copy of an Entry of Appearance which I have filed on your behalf as the interim counsel employed by your insurance company under the claim number captioned above to defend you in the lawsuit which was filed against you. The lawfirm of Klecan & Roach, P.A., will, as soon as substitution of counsel has been effectuated, no longer represent you in this matter unless you choose to have that lawfirm represent you personally, in which case compensation for their fees would be your personal responsibility.

As soon as permanent counsel has been retained by State Farm you will be advised, and will, following hiring of permanent counsel, be represented throughout the remainder of the lawsuit by that lawfirm.

In order that I may be able to contact you on short notice, I request that you immediately notify this office as to any change in your present address, even though it may be a temporary change.

If you should have any questions concerning these changes in representation, please do not hesitate to call

me collect, at the telephone number listed in this letterhead. I would also be pleased to discuss with you any other questions or concerns which you may have.

Sincerely yours,
Thomas A. Simons, IV

TAS/jm
Enclosure
cc: Klecan & Roach, P.A.

Exhibit B

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

IRENE BENTLEY LUTHER,
Plaintiff,

vs. No. CV-79-02277

DONALD KINNEY
Defendant

ENTRY OF APPEARANCE

COMES NOW THOMAS A. SIMONS, IV, Attorney at Law, and enters his appearance in behalf of the defendants for whom the lawfirm of Klecan & Roach, P.A. have entered their appearance herein. This entry of appearance is now limited to an entry for the purpose of receiving all documents, pleadings and correspondence in the action and for obtaining substitution of counsel.

THOMAS A. SIMONS, IV
Attorney for defendant
Post Office Box 2341
Santa Fe, New Mexico 87501

I HEREBY CERTIFY that a copy of the foregoing was mailed to opposing counsel of record this 26th day of June, 1980, postage prepaid.

THOMAS A. SIMONS, IV

Exhibit C

THOMAS A. SIMONS, IV
Attorney at Law

Territorial Plaza
327 Sandoval, Suite 101
Post Office Box 2341
Santa Fe, New Mexico 87501
Telephone: (505) 988-4476

Ronald A. Williams, Esquire
P. O. Box 2020
Santa Fe, New Mexico 87501

Re: John Doe vs. Jane Smith
Rio Arriba County District Court No. 78-90

Dear Mr. Williams:

This is to inform you that I will be substituting my appearance for the defendants for whom the lawfirm of Klecan & Roach, P.A. have entered their appearance in the above-referenced case as soon as the mechanics of substitution of counsel have been arranged. To that end I have enclosed herewith a copy of my Entry of Appearance in this case.

I would appreciate it if you would, herceforth, send to me copies of all pleadings, documents, and correspondence with reference to this case. Please note, however, that my entry of appearance is for the purpose of receiving service of all documents filed and to effect substitution. Until I have been substituted as counsel, however, the lawfirm of Klecan & Roach, P.A. is still counsel of record.

The mechanics of withdrawal by the firm of Klecan & Roach, P.A., and the substitution of counsel will take some time. I therefore would personally appreciate you postponing any discovery, motion hearings or trial settings until we have had a chance to complete substitution and review the files. If you already have any such matters scheduled or feel that you must pursue some aspect of the

case in the near future, I would like to discuss that matter with you.

Also, if you have any questions in general concerning the status of the defense representations in this case, please do not hesitate ot contact me.

Thank you very much for your cooperation.

Sincerely yours,
Thomas A. Simons, IV

TAS/jm
Enclosure
cc: Klecan & Roach, P.A.

Appendix C

Filed 1-29-1981

ORDER

THIS MATTER having come up on the Court's own motion and the Court having examined the Complaint, FINDS AND CONCLUDES that there are not sufficient allegations in the Complaint to support the existence of Federal Court jurisdiction over this action;

NOW, THEREFORE, IT IS ORDERED that the Complaint in this action shall be, and is hereby, dismissed.

Santiago E. Campos

United States District Judge

Appendix D

No. 81-1160

PETITION FOR WRIT OF MANDAMUS

COME NOW the Petitioners, Donald Kinney and Margaret Kinney, and apply for a Writ of Mandamus directing the Honorable Santiago E. Campos, United States District Judge for the District of New Mexico, to withdraw the Order of Dismissal which he entered in this case on January 29, 1981, and to reinstate Cause No. CIV-80-630-C on his docket. A copy of the Order of Dismissal is attached as Exhibit "1" to this Petition.

STATEMENT OF FACTS

Petitioners filed a civil lawsuit on July 25, 1980, in the United States District Court for the District of New Mexico. A copy of their Complaint is attached as Exhibit "2" to this Petition. The case was assigned to Judge Santiago Campos.

Defendants in that case are State Farm Mutual Automobile Insurance Company and six of its agents and employees. The basis of that lawsuit was that the defendants, in concert with several state District Court Judges in Bernalillo County, New Mexico, had conspired to violate Petitioners' legal and Constitutional rights and that the Defendant insurance company had acted in bad faith and in disregard of the rights of its insureds. Petitioners' Complaint alleged that Defendants had acted under color of law and in violation of 42 U.S.C. §1983 and §1985. The Complaint requested damages in the sum of $6 million. Several Answers were filed by the various Defendants. Copies of those Answers are attached as Exhibit "3" to this Petition. The Answers of the out-of-state Defendants alleged lack of personal jurisdiction. None of the Answers alleged that the Federal Court lacked subject matter jurisdiction over this lawsuit nor did any of the Answers allege that Petitioners' Complaint failed to state a cause of action. No motion was ever made by any Defendant to

dismiss for lack of jurisdiction. On October 6. 1980, Defendants made a motion to disqualify opposing counsel, a copy of which is attached as Exhibit "4".

STATEMENT OF ISSUES PRESENTED AND RELIEF SOUGHT

The issue presented is whether a District Judge can dismiss a Complaint for lack of jurisdiction without giving any notice to the parties and without giving the parties any opportunity to be heard.

STATEMENT OF THE CASE

This case is an action by insureds against their own insurance carrier for the conduct of the insurer in conspiring with judicial officials in Bernalillo County, New Mexico, to violate Plaintiffs' legal and constitutional rights and for the bad faith conduct of the insurer which was in utter disregard for the rights of the plaintiffs. Several defendants filed Answers but no motion to dismiss was filed by any party. District Judge Santiago Campos, without any notice to the parties and without affording them any opportunity to be heard, dismissed the action for lack of jurisdiction on January 29, 1981. Notice of Appeal was filed February 27, 1981.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

The issue presented is whether a District Judge can dismiss a Complaint for lack of jurisdiction without giving any notice to the parties and without giving the parties any opportunity to be heard. The issue is *not* whether a District Judge can dismiss a complaint for lack of jurisdiction on his own motion. A District Judge has the right, and in fact the duty, to raise the issue of subject matter jurisdiction whenever he believes jurisdiction may be lacking. The issue is whether a District Judge, after raising the jurisdictional issue in his own mind, can then dismiss a complaint without giving any notice to the plaintiffs and without giving them any opportunity at all to be heard on the jurisdictional issue.

TABLE OF AUTHORITIES

Case: *Pages*

American Federation of Musicians v. Bonatz, 475 F.2d 433 (3rd Cir., 1973) 5

Clinton v. Los Angeles County, 434 F2nd 1038 (9th Cir. 1970) 4

Cooper v. United States Penitentiary Leavenworth, 433 F. 2d 596 (10th Cir. 1970) 5

Council of Federated Organizations v. Mize, 339 F.2d 898 (5th Cir., 1964) 5

Harmon v. Superior Court of California, 307 F2d 796 (9th Cir., 1962) 4-5

Herzog and Straus v. GRT Corp., 553 F.2d 789m 792 (6th Cir., 1977) 6-7

Jordan v. County of Montgomery, 404 F. 2d 747 (3rd Cir., 1968) 6

Literature, Inc. v. Quinn, 482 F.2d 372 (1st Cir., 1973), ... 4

Postal Tel. Cable Co. v. Newport, 247 U.S. 464, 62 L. Ed. 1215, 38 S. Ct. 556 (1918) 4

Powell v. Alabama, 287 U.S. 45, 77 L. Ed. 158, 53 S.Ct. 55 (1932) 4

Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir., 1979) 7

Urbano v. Calissi, 353 F.2d 196 (3rd Cir., 1965) ... 5-6

Winkleman v. New York Stock Exchange, 445 F.2d 786 (3rd Cir., 1971) 5

Other Authorities:
Federal Rules of Civil Procedure, Rule 12 6-7

Rules of the Federal District Court for the District of New Mxeico, Rule 9 7

Appendix F

MARCH TERM - April 1, 1981

Before Honorable James E. Barrett, Honorable Monroe G. McKay and Honorable James K. Logan, Circuit Judges, United States Court of Appeals

April 1, 1981

This matter comes on for consideration of petitioners' application for mandamus relief and the response thereto.

Upon consideration thereof, it is concluded that petitioners have an adequate appellate remedy. *See* United States v. Martin, 620 F.2d 237 (10th Cir. 1980). Accordingly, the petition is denied and the action is dismissed.

Howard K. Phillips, Clerk

Appendix G

2-19-81

Petitioners have commenced an original action in the nature of mandamus. In accordance with Fed.R.App.P. 21(b), the respondent is requested to file an answer to the petition on or before March 12, 1981.

The clerk of this court shall certify a copy of this order to the respondent and all ohter parties to the action in the trial court.

3-10-81

ANSWER TO PETITION FOR WRIT OF MANDAMUS

COMES NOW the Respondent, the Honorable Santiago E. Campos, United States District Judge for the District of New Mexico, by and through the law firm of Atwood, Malone, Mann & Cooter, P.A., and for his Answer in response to the Petition for Writ of Mandamus, states:

2. By virtue of Rule 81(b) of the Federal Rules of Civil Procedure, the Writ of Mandamus has been abolished, and Petitioners have an adequate remedy by appeal, therefore, the Writ of Mandamus is not a valid remedy available to Petitioners in this cause.

February 19, 1981

R. D. Mann, Esq.
Attorney at Law
P. O. Drawer 700
Roswell, New Mexico 88201

RE: Kinney v. Campos
U.S.C.A. No. 81-1160

Dear Mr. Mann:

I have a copy of letter dated February 13, 1981, from Mr. Howard K. Phillips to Mr. Eugene Klecan. It appears a copy of the same letter was mailed to you.

May I assume that you will represent me? I am not certain as to how representation on a case like this is handled in the federal courts. In state court counsel defending the position taken by the trial court ordinarily represents the judge hailed into court by the unhappy litigant.

My only thought on the case is that the proper remedy in this case is an appeal from my order dismissing the case. I really doubt that the extraordinary writ of mandamus is available in a case such as this. However, I'll leave this to the lawyers who know about such things.

Sincerey,

Santiago E. Campos
United States District Judge

cc: Eugene Klecan, Esq.

NOVEMBER TERM - January 26, 1983

Before Honorable Oliver Seth, Chief Judge, Honorable Delmas C. Hill, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges, United States Court of Appeals

DONALD KINNEY and MARGARET KINNEY Plaintiffs-Appellants v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ARTHUR W. TEAGUE, MANUEL MENDOZA, GERALD W. STRICKLAND, THOMAS A. SIMONS, IV, CLEMENT VAUGHAN, and EDWARD B. RUST, Defendants-Appellees.	)	NO. 81-1264

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing en banc.

Upon consideration thereof, the petition for rehearing is denied by the panel to whom the case was submitted.

The petition having been denied by the panel and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, the suggestion for rehearing en banc is denied.

Filed Nov. 4, 1982

PETITION FOR REHEARING BY THE COURT ENBANC

COMES NOW the Appellant in the above entitled cause and moves the court for a rehearing and with particularity points out that the opinion cites the case of *Conley v. Gibson*, 355 U. S. 41, as the sole basis for authorizing a dismissal by the court below of the Appellant's cause of action. The dismissal was without motion by the court or any opposing party and was without a stated reason in the dismissal and, of course, no notice or hearing. The case of *Conley v. Gibson* not only does not support this procedural violation of due process, but holds against what the lower court did.

Rules of Procedure

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings

(a) When Presented. A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state

a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(h) Waiver or Preservation of Certain Defenses.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

APPENDIX M

2-1-83

Pursuant to Rule 41(b), Donald Kinney and Margaret Kinney move for a Stay of Mandate pending application to the Supreme Court for a Writ of Certiorari.

APPENDIX N

STATE OF NEW MEXICO
SECOND JUDICIAL DISTRICT

GERALD R. COLE
District Judge
Division Eight
(505) 842-3089

Post Office 488
Albuquerque, N. M. 87102

January 16, 1981

Mr. Eugene E. Kleean
Attorney at Law
520 Sandia Savings Building
4th and Gold S.W.
Albuquerque, New Mexico 87102

Dear Mr. Kleean:

Mr. Ruiz has referred to me your letter of January 14, 1981, so that I may reply to it as the Presiding Judge of this District.

Until November 1977, judges' meetings were closed. After that, judges' meetings were open to the public, with certain defined exceptions, one of which is discussions of pending cases.

At no time has any person been permitted to review a

tape of a closed meeting other than a District Judge who may have missed a particular meeting.

I do not intend to vary court policies for your individual benefit. No other counsel in any of the subject cases has or will have access to the material you request.

GERALD R. COLE
GRC:jl

cc: Mr. Tom Ruiz

APPENDIX O

BASIS OF JURISDICTION

☐ 1 U. S. Plaintiff ☐ 2 U. S. Defendant ☒ 3 Federal Question (U. S. Not a Party) ☐ 4 Diversity

CAUSE OF ACTION (Cite the U. S. Civil Statute Under Which You Are Filing and Write a Brief Statement of Cause)

42 USC §§1983, 1985, and 1986. Plaintiffs claim damages as provided in the above statutes.

JURY

Plaintiffs

1. Kinney, Donald
2. Kinney, Margaret

Defendants

SANTIAGO E. CAMPOS

1. State Farm Mutual Automobile Ins.

CLOSED

Cause

42 U.S.C. Sections 1983, 1985 and 1986.
Plaintiffs claim damages under Civil Rights Statutes.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment 1

Religious and political freedom.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment 13

Section 1. Slavery prohibited.

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Section. 2. Power to enforce amendment.

"Congress shall have power to enforce this article by appropriate legislation."

Amendment 14

Section 1. Citizens of the United States.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Sec. 5. Power to enforce amendment.

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

RULES OF APPELLATE PROCEDURE

Rule 2. Suspension of Rules

In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

NOTES OF ADVISORY COMMITTEE ON AMENDMENTS TO RULES

The prmiary purpose of this rule is to make clear the power of the courts of appeals to expedite the determination of cases of pressing concern to the public or to the litigants by prescribing a time schedule other than that provided by the rules. The rule also contains a general authorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result. Rule 26(b) prohibits a court of appeals from extending the time for taking appeal or seeking review.

II. APPEALS FROM JUDGMENTS AND ORDERS OF DISTRICT COURTS

Rule 3. Appeal as of Right—How Taken

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 USC § 1292(b) 28 USCS § 1292(b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6, respectively.

V. EXTRAORDINARY WRITS

Rule 21. Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs

(a) Mandamus or Prohibition to a Judge or Judges: Petition for Writ;

Service and Filing. Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(b) Denial; Order Directing Answer. If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. The proceeding shall be given preference over ordinary civil cases.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constituiton and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§ 1985. Conspiracy to interfere with civil rights

(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so

attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; . . .

§ 1986. Action for neglect to prevent conspiracy

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section [42 USCS § 1985], are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action, . . .

Rule 40. Petition for Rehearing

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner

desires to present. Oral argument in support of the petiiton will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition will not be permitted. No answer ot a petition a final disposition of the cause without reargument or may restore it to the Calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.